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In The

Supreme Court of the United States

JAMES OLIVER REESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit erroneously conclude that strict scrutiny does not apply to Mr. Reese's as applied Second Amendment challenge to 18 U.S.C. § 922(g)(8), where enforcement of the statute results in a 50-year criminalization of the core aspect of his fundamental right to possess firearms, despite the fact that Mr. Reese is not a felon or a misdemeanant and has never been found to have engaged in domestic abuse?

2. Did the Tenth Circuit err in treating Mr. Reese's as applied challenge as a "collateral attack" on the predicate domestic relations order, thereby excising the 50-year duration of the firearm disability from the Second Amendment analysis, where Mr. Reese explicitly abandoned any such "collateral attacks" in the district court?

PARTIES TO THE PROCEEDINGS BELOW

The parties named in the caption are the only parties to the proceedings below.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 4

The Tenth Circuit Improperly Analyzed Mr. Reese's Challenge Under An Intermediate Level Of Scrutiny. The Correct Standard Was Strict Scrutiny Because The Right At Issue In This Case Is The Core Component Of A Fundamental Right 6

The Tenth Circuit Failed To Conduct A Proper As Applied Inquiry 12

The Lower Courts Require Guidance In The Rapidly Evolving Area Of Second Amendment Jurisprudence 20

CONCLUSION 23

APPENDIX

Tenth Circuit Memorandum Opinion and Order, December 10, 2010 ..... App. 1

District Court Memorandum Opinion and Order, January 13, 2010 ..... App. 29

TABLE OF CONTENTS – Continued

Page

Tenth Circuit Order Denying Rehearing and Rehearing *En Banc*, February 7, 2011..... App. 41

Order for Protection, Hawaii Family Court, February 23, 2005 (as amended March 17, 2005)..... App. 42

TABLE OF AUTHORITIES

Page

CASES

Alcoa S.S. Co., Inc. v. United States, 338 U.S. 421 (1949) 22

Buckley v. American Constitutional Found., Inc., 525 U.S. 182 (1999) 10

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 9, 10

Civil Aeronautics Bd. v. State Airlines, 338 U.S. 572 (1950) 22

Clark v. Jeter, 486 U.S. 456 (1988) 9

District of Columbia v. Heller, 554 U.S. 570 (2008) ..... *passim*

Johnson v. California, 543 U.S. 499 (2005) 11

Lee v. Kemna, 534 U.S. 362 (2002) 13

Lewis v. United States, 445 U.S. 55 (1980) 17

McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) 4, 21

Miranda v. Arizona, 384 U.S. 436 (1966) 22

Plyler v. Doe, 457 U.S. 202 (1982) 9

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 9

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 9

Schiro v. Farley, 510 U.S. 222 (1994) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Chester, 628 F.3d 673 (4th Cir. 2010) 4, 5, 10, 16, 19

United States v. Emerson, 270 F.3d 203 (5th Cir. 2001) 15, 16

United States v. Grimmett, 439 F.3d 1263 (10th Cir. 2006) 18

United States v. Lippman, 369 F.3d 1039 (8th Cir. 2004) 15

United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010) 5, 6, 11

United States v. Pruitt, 502 F.3d 1154 (10th Cir. 2007), *vacated on other grounds*, 552 U.S. 1306 (2008) 15

United States v. Salerno, 481 U.S. 739 (1987) 5, 18

United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) ..... *passim*

United States v. Tooley, 717 F. Supp.2d 580 (S.D. W. Va. 2010) 10

United States v. Vonxgay, 594 F.3d 1111 (9th Cir. 2010) 17

United States v. Williams, 616 F.3d 685 (7th Cir. 2010) 16

Wall v. Kholi, ___ U.S. ___, 2011 WL 767700 (Mar. 7, 2011) 13

Washington v. Glucksburg, 521 U.S. 702 (1997) 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 922(g) 15, 17

18 U.S.C. § 922(g)(1) 17

18 U.S.C. § 922(g)(8) ..... *passim*

18 U.S.C. § 922(g)(9) 10

28 U.S.C. § 1254(1) 1

CONSTITUTIONAL PROVISIONS

First Amendment 4

Second Amendment ..... *passim*

OTHER AUTHORITIES

Adam Winkler, *Scrutinizing the Second Amendment,* 105 MICH. L. REV. 683 (2007) 21

Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007-2008 CATO SUP. CT. REV. 127 (2008) 20

J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling of the Rule of Law*, 95 VA. L. REV. 253 (2009) 21

Laurence H. Tribe, *American Constitutional Law* § 16-33 (2d ed. 1988) 9

TABLE OF AUTHORITIES – Continued

Page

Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply To Gun Control Laws?* 105 NW. U. L. REV. COLLOQUY 85 (2010) 22

Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J. L. & PUB. POLICY 203 (2009) 21

Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, American Constitution Society for Law and Policy (2010), available at http://www.acslaw.org/files/Mehr%20andWinkler%Standardless%Second%Amendment%.pdf 21

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (the "Opinion") (App. 1) is reported at 627 F.3d 792 (10th Cir. 2010). The opinion of the District Court (App. 29) is unpublished.

BASIS FOR JURISDICTION

The Tenth Circuit entered judgment on December 10, 2010. It denied rehearing and rehearing *en banc* on February 7, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the Second Amendment is quoted in the Opinion at App. 16. The text of 18 U.S.C. § 922(g)(8) is quoted at App. 13-15.

STATEMENT OF THE CASE

The United States indicted Mr. Reese under 18 U.S.C. § 922(g)(8), which proscribes possession of a firearm by a person who is subject to a domestic restraining order that "prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. . . ." The order here

(the "Hawaii Order"), issued by a state family court in Hawaii incident to Mr. Reese's divorce from his ex-wife, Jennifer, was uncontested and accordingly included no findings of abuse or other misconduct of any sort. By its terms, the Hawaii Order remains in effect for 50 years from its entry, until 2055. App. 4, 53. "[N]o finding of abuse was made" in the Hawaii family court proceedings. App. 30. Mr. Reese was arrested and indicted under § 922(g)(8) after police found handguns at Mr. Reese's residence in Milan, New Mexico. App. 7-11, 30.

Mr. Reese challenged the constitutionality of § 922(g)(8) as applied in his circumstances and moved to dismiss the indictment. He argued that, in light of (1) the 50-year span of the Hawaii Order, (2) the fact that he was not a felon or a misdemeanant, and (3) the absence of any finding of domestic abuse against him, the indictment unconstitutionally infringed on his Second Amendment rights. The district court recognized that, although Mr. Reese's initial argument focused on the validity of the Hawaii Order and mounted several collateral attacks upon it, Mr. Reese abandoned these attacks during the briefing process. App. 32. The district court granted Mr. Reese's motion, finding that § 922(g)(8) was unconstitutional as applied to Mr. Reese. App. 39. The district court rejected Mr. Reese's facial challenge to § 922(g)(8). App. 37-38.

The United States appealed and the United States Court of Appeals for the Tenth Circuit reversed. The Opinion rejected Mr. Reese's as applied

Second Amendment challenge to § 922(g)(8), reasoning as follows:

> Although Reese argued below, and the district court agreed, that the underlying protective order in this case was infirm due to its purported fifty-year length and because Reese no longer presented a legitimate threat to Jennifer due to the significant distance between their current residences, those concerns are simply not relevant in these federal proceedings, **even for purposes of considering Reese's as applied challenge to § 922(g)(8)**. Instead, any such challenges could and should have been raised by Reese in the Hawaii Family Court. . . . **[T]he court erred in focusing on the underlying protective order issued by the Hawaii Family Court instead of the challenged federal statute.** For the reasons explained above, it was improper for the district court to engage in what was effectively a collateral review of the protective order.

App. 27-28 (emphasis added).

The Opinion analyzed Mr. Reese's challenges to the as applied constitutionality of § 922(g)(8) under an intermediate level of scrutiny, thereby considering whether the statute is substantially related to an important governmental purpose. App. 21. The Opinion declined to apply a strict scrutiny standard, but also concluded that the indictment would survive strict scrutiny review. App. 26, n.4. The Tenth Circuit denied rehearing, rehearing *en banc*, and Mr. Reese's

motion for a stay of the mandate pending his petition for certiorari.

REASONS FOR GRANTING THE PETITION

Mr. Reese respectfully petitions for a writ of certiorari to consider and reverse the Opinion. In declining to apply a strict scrutiny level of review, the Opinion conflicts with (i) precedents recognizing that Second Amendment rights to keep and bear arms are fundamental, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); (ii) the recognition in *Heller* that an individual's right to keep guns in the home for self-defense is the "central component of the [Second Amendment] right itself," 554 U.S. at 599; and (iii) precedents recognizing that a strict scrutiny standard governs review of restrictions on core aspects of fundamental rights. *See, e.g., Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (stating that the government may not infringe on a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest); *United States v. Chester*, 628 F.3d 673, 683-84 (4th Cir. 2010) (recognizing that, as with First Amendment analysis, the applicability of strict scrutiny or intermediate scrutiny in relation to Second Amendment cases depends on the nature of the conduct being regulated and the extent to which the challenged law burdens the right).

Where a case presents a restriction on the core Second Amendment right identified in *Heller* – the right of a law abiding, responsible citizen to possess and carry a weapon for self-defense – strict scrutiny applies. *Chester*, 628 F.3d at 683. An intermediate level of scrutiny applies if the defendant asserts rights not within the core identified in *Heller*. *Id.* (citing *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010)). The Opinion conflicts with precedents from this Court and other Circuits, including *Chester*, that recognize that strict scrutiny governs review of restrictions on core components of fundamental rights.

The Opinion also conflicts with the precedents of this Court directing that, in addressing an as applied constitutional challenge, the reviewing court must consider the contested government action in the particular circumstances of the case at issue. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (contrasting challenge to facial validity of statutes with as applied challenge, which involves the application of the statute in a specific factual setting). In Mr. Reese's case, the 50-year duration of the protective order was one of the particular facts defining the circumstances in which the Court should have conducted the as applied analysis. Instead, the Opinion improperly sidestepped the effect of the Hawaii Order's duration. The Opinion erroneously concluded that Mr. Reese's reliance on the order's long duration transformed his as applied challenge to § 922(g)(8) into a "collateral attack" on the Hawaii Order. In

doing so, the Opinion failed to conduct a proper as applied analysis and ignored the 50-year prohibition of Mr. Reese's fundamental right to possess a firearm for self defense.

The Tenth Circuit Improperly Analyzed Mr. Reese's Challenge Under An Intermediate Level Of Scrutiny. The Correct Standard Was Strict Scrutiny Because The Right At Issue In This Case Is The Core Component Of A Fundamental Right.

The most conspicuous problem presented by the Opinion is the decision to apply an intermediate standard of review, instead of strict scrutiny. The decision to do so rested on the conclusion that, depending upon the type of law challenged, and the type of Second Amendment restriction at issue, intermediate scrutiny may be appropriate. The Opinion anchored this conclusion on *United States v. Marzzarella,* 614 F.3d 85 (3d Cir. 2010) (upholding prohibition on possession of guns with obliterated serial numbers), and *United States v. Skoien,* 614 F.3d 638 (7th Cir. 2010) (en banc) (upholding prohibition on possession of guns by person convicted of misdemeanor crime of domestic violence). App. 18-24. The Court reasoned that the "characteristics" of § 922(g)(8), as compared with the statutes considered in *Marzzarella* and *Skoien,* justified intermediate review. App. 21.

This analysis misapprehended the relevant burdens and interests by overlooking the fact that

Mr. Reese's case presents core aspects of the Second Amendment right, as recognized in *Heller*. The Court failed to account for the most constitutionally significant facts in this case: the 50-year duration of the Hawaii Order and the fact that Mr. Reese has never been found to have committed, or been convicted of, domestic violence. These facts, and the core nature of the Second Amendment right at issue, appear to have made no difference in the selection of the appropriate level of scrutiny. The Court mistakenly reasoned that, like the statute considered in *Skoien*, § 922(g)(8) applies to a narrow class of persons "who, based on their past behavior, are more likely to engage in domestic violence." App. 21. This reasoning disregarded the fact that the Hawaii court did not find Mr. Reese had engaged in abuse of any sort, that he has never been convicted of domestic violence, and that the statute considered in *Skoien* applied only to persons convicted of misdemeanor crimes of domestic violence.

The decision to apply an intermediate level of scrutiny also failed to account for the heavy burden on Mr. Reese's rights resulting from the 50-year duration of the Hawaii Order and the resulting 50-year criminalization of gun possession by Mr. Reese under § 922(g)(8). The choice of an intermediate level of scrutiny makes no allowance for the characterization in *Heller* of the right of individual law abiding citizens to keep guns in their homes for self-defense as the "core component" of the Second Amendment. *See Heller*, 554 U.S. at 630 (referring to the "core

lawful purpose of self-defense" served by the Second Amendment); *id.* at 634 (criticizing Justice Breyer's proposed interest balancing approach on the ground that "[w]e know of no other enumerated constitutional right whose core protection has been subjected" to such a test); *id.* at 720 (Breyer, J., dissenting) (questioning the basis for the majority's identification of "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" as the core of the Second Amendment right). Selection of the intermediate level of scrutiny cannot be reconciled with the core quality of the rights restricted by the indictment.

Other aspects of the Opinion suggest that the reversal of the district court resulted from an improper tipping of the balance in favor of the United States. For example, the structure of § 922(g)(8) indicates that the contents of the Hawaii Order and Mr. Reese's possession of the firearms while the Hawaii Order was in effect are the sole permissible grounds for the indictment. The Opinion nonetheless devoted approximately ten of its 28 pages to recounting the unflattering allegations in Jennifer Reese's *ex parte* petition for a restraining order and to the irrelevant and disputed account of the events surrounding Mr. Reese's arrest. App. 2-11. These "facts" may not be fairly enlisted as support for the government's case, which rests entirely on the fact that the Hawaii Order "prohibited the use, attempted use, or threatened use of physical force against Jennifer and their minor children." App. 25, citing § 922(g)(8)(C)(ii).

The misuse of the "facts" from the allegations in Mrs. Reese's restraining order petition and from the suppression hearing do not satisfy the government's burden of demonstrating, in the circumstances of this case, a compelling interest.

The Opinion thus failed to justify a departure from the usual practice of applying strict scrutiny to restrictions on core aspects of fundamental constitutional rights. A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). "[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "Under the strict-scrutiny test," the government has the burden to prove that a restriction "is (1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002). By contrast, a statute is to be analyzed under intermediate scrutiny if it infringes "'important', although not necessarily 'fundamental,' rights or interests," Laurence H. Tribe, *American Constitutional Law* § 16-33, at 1610 (2d ed. 1988), or if it "involves government's use of sensitive, although not necessarily suspect, criteria or classification." *Id.* at 1613. As examples, education is an interest important enough, *see Plyler v. Doe*, 457 U.S. 202, 223-24 (1982), and gender and illegitimacy are classes sensitive enough, *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985), to warrant intermediate

scrutiny. To satisfy intermediate scrutiny, classifications or restrictions made under a statute need only be "substantially related" to an important governmental interest. *See id.* at 441.

In the context of federal gun control statutes, these concepts direct the application of strict scrutiny when, as in Mr. Reese's case, the restriction at issue infringes on the "core components" of Second Amendment rights, as recognized in *Heller* and *Chester. See, e.g., United States v. Tooley*, 717 F. Supp.2d 580, 587 (S.D. W. Va. 2010) (recognizing, in as applied challenge, that strict scrutiny would apply if court determined that § 922(g)(9) affected core Second Amendment rights). The Opinion overlooked the "core" nature of Mr. Reese's Second Amendment rights, evident from the facts that the firearms at issue were kept at his residence, that he is not a felon or a misdemeanant, and that the enforcement of § 922(g)(8) creates a lifetime ban on Mr. Reese's right to possess firearms. Under our constitutional jurisprudence, severe restrictions on core aspects of fundamental rights are generally reviewed under strict scrutiny. *See, e.g., Buckley v. American Constitutional Found., Inc.*, 525 U.S. 182, 207 (1999) (Thomas, J., concurring) ("When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech."); *Chester*, 628 F.3d at 682 (explaining that a content based restriction on non-commercial speech is permissible "only if it satisfies strict scrutiny," quoting *United States v. Playboy Entm't Grp.*,

529 U.S. 803, 813 (2000)). The Tenth Circuit's use of an intermediate, rather than strict, standard of scrutiny requires correction to clarify the applicable burden in prosecuting gun possession cases. *See, e.g., Johnson v. California,* 543 U.S. 499, 515 (2005) (holding that strict scrutiny applied to equal protection challenge to policy of segregating new inmates by race, where Ninth Circuit had applied a standard resembling intermediate scrutiny, and remanding for consideration of the challenged policy under strict scrutiny).

The Opinion's reliance on *Marzzarella* and *Skoien* unfairly excused the United States from the burden of demonstrating that, in the circumstances of this case, enforcement of § 922(g)(8) against Mr. Reese served a compelling state interest in preventing domestic gun violence and that the statute is narrowly tailored to serve those interests. The Opinion's offhand suggestion that Mr. Reese's indictment would survive strict scrutiny review for the same reasons it passed intermediate review did not account for the complete absence of evidence suggesting a risk of domestic gun violence posed by non-felons or non-misdemeanants. The Opinion improperly relied on the data borrowed from *Skoien,* which expressly concerned the risks of gun-related domestic violence posed by persons already found to have committed domestic abuse. By doing so, the Opinion treated Mr. Reese as if he had been found guilty of a felony or misdemeanor domestic abuse offense.

The Tenth Circuit Failed To Conduct A Proper As Applied Inquiry.

The Opinion conflicts with the precedents of this Court and circuit courts which demonstrate that a proper as applied analysis would have addressed the effects of the Hawaii Order. The Tenth Circuit avoided conducting a correct as applied analysis by treating reliance on the combined effect of the Hawaii Order and § 922(g)(8) as an impermissible collateral attack on the Hawaii Order.

Instead of making the argument that § 922(g)(8) does not apply because the Hawaii Order was invalid, Mr. Reese argued, and the district court agreed, that § 922(g)(8) is *unconstitutional as applied* here. As the district court stated:

> In support of this second argument, Defendant focuses mainly on the fact that the Order of Protection is not temporary but is, by virtue of its 50-year term, effectively a lifetime ban on his right to bear arms. Although Defendant initially mounted several collateral attacks to the validity of the Protection Order in his Motion, these arguments were abandoned in his Reply Brief.

App. 32.

The district court did not reconsider the merits of the Hawaii Order, other than as it applied in the § 922(g)(8) prosecution:

> In contrast to the restraining orders at issue in [*United States v. Knight*, 574 F. Supp. 2d

> 224 (D. Me. 2008)] and [*United States v. Luedtke*, 589 F. Supp. 2d 1018 (E.D. Wis. 2008)] the 50-year Order of Protection in the present case is less narrowly tailored to serve the governmental interest of reducing domestic violence. The maximum duration of the Wisconsin order at issue in *Luedtke* was only four years. . . . The Order in the present case is simply not narrowly tailored to achieve the compelling governmental purpose of preventing domestic violence between Defendant and Jennifer May. . . . Finding that the statute, 18 U.S.C. § 922(g)(8), under which Defendant is indicted is unconstitutional as applied to Defendant, the Court GRANTS Defendant's Motion to Dismiss.

App. 39.

The district court did not entertain a collateral attack on the Hawaii Order because Mr. Reese abandoned any attempt to have the district court address its invalidity. The district court did not find that the Hawaii Order was issued without due process, without sufficient facts to support it, or that it was issued without notice, without a hearing, or without assistance of counsel.[1] As the Tenth Circuit noted, the Hawaii Order "was issued after a hearing of which

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[1] The district court's opinion and Mr. Reese's briefing referred, in a few instances, to the constitutionality of the Hawaii Order. The district court's decision should nonetheless be sustained under the rule that the district court may be affirmed on any ground supported by the record. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 391 (2002).

Reese received actual notice and in which Reese had an opportunity to participate. . . ." App. 25. Mr. Reese abandoned any collateral attack on the Hawaii Order and his as applied challenge to § 922(g)(8) cannot be reasonably likened to a collateral attack. *See, e.g., Wall v. Kholi*, ___ U.S. ___, ___, 2011 WL 767700 at *5 (Mar. 7, 2011) (defining "collateral attack" as "[a]n attack on a judgment in a procedure other than a direct appeal" (quoting *Black's Law Dictionary* 298 (9th ed. 2009)).

Referring to "Reese's as applied challenge to § 922(g)(8)," the Tenth Circuit concluded that "any such challenges could and should have been raised by Reese in the Hawaii Family Court." App. 28. Mr. Reese, however, had no reason to challenge § 922(g)(8), as applied to him, until the United States prosecuted him under that statute on the basis of the Hawaii Order. The question of whether enforcement of § 922(g)(8) violates Mr. Reese's Second Amendment rights in the circumstances of his case could not have arisen in the divorce proceeding. The suggestion that the constitutionality of § 922(g)(8) should have been addressed in the Hawaii family court is unrealistic and unfair.[2]

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[2] The Opinion suggests that Mr. Reese "arguably" waived his Second Amendment rights. App. at 26, n.3. The United States did not present a developed waiver argument in the district court or in its appellate briefing. The issue is not preserved. *See, e.g., Schiro v. Farley,* 510 U.S. 222, 229 (1994) (declining to address state's retroactivity argument because it had not been raised in the lower courts or in opposition to the defendant's petition for certiorari).

Nothing prevents an as applied constitutional challenge to § 922(g), based on the facts of Mr. Reese's case. "An as applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007), *vacated on other grounds*, 552 U.S. 1306 (2008).

The "particular circumstances" of an as applied challenge to statutes prohibiting gun possession by persons subject to restraining orders will unavoidably include the facts relating to the underlying order. Courts have entertained as applied constitutional challenges to § 922(g)(8) reflecting consideration of the impact of the underlying order as among the "circumstances" bearing upon the as applied analysis, including the duration of the predicate order. In *United States v. Lippman*, 369 F.3d 1039, 1043 (8th Cir. 2004), the defendant argued that a restraining order was "not narrowly tailored as applied to him because he ha[d] not been found to pose a real threat or danger to others." Rather than viewing this as an impermissible collateral attack, the court reviewed the order – which had a duration of only 3 years, *id.* at 1041 – and decided that "the order issued against Lippman was narrowly tailored to restrict his firearm possession *for a limited duration*. . . ." *Id.* at 1044 (emphasis added).

United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), similarly illustrates that an as applied

challenge to statutes like § 922(g)(8) may present the effect of an underlying order without collaterally attacking the order itself. The *Emerson* court rejected a collateral attack based on insufficiency of the evidence in the underlying state court proceeding to show a credible threat, but nonetheless considered the as applied constitutionality of § 922(g)(8) on the ground that it contained no requirement of a finding in the predicate order that the defendant posed a danger. *Id.* at 211, 262-64. The court concluded that "the predicate order in question here [was] sufficient, albeit likely minimally so, to support the deprivation, while it remains in effect." *Id.* at 265. The court's analysis included the fact that the order would self-terminate upon the entry of a final divorce decree. *Id.* at 263. Although the court would not consider a collateral attack on the order to determine that its invalidity rendered the statute inapplicable, it clearly considered whether the *statute* was unconstitutional as applied, in light of the effects of the predicate order, including its duration.

Courts have analyzed as applied Second Amendment challenges in relation to prohibitions on firearm possession by felons, *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010), and by persons convicted of a misdemeanor crime of domestic violence. *Chester*, 628 F.3d at 683. This petition should be granted to confirm that the effects of the underlying order are legitimately part of the as applied analysis. The Opinion conflicts with cases recognizing that as applied challenges to § 922(g)(8) may consider the

impact of the predicate order, including its duration, without running afoul of the prohibition against collateral attacks.

The Opinion cites precedents supporting the preclusion of a collateral attack on a predicate status listed in § 922(g), but not the preclusion of an as applied challenge to § 922(g) itself. *See* App. 27, citing, *e.g.*, *Lewis v. United States*, 445 U.S. 55, 60-61 (1980). None of the precedents cited in the Opinion held that an as applied challenge to § 922(g) which accounts for the effects of the predicate order is actually a collateral attack. To be sure, *Lewis* rejected an equal protection challenge to a ban on felon gun possession applying a rational basis analysis, implying in dictum that Second Amendment rights are not fundamental and only apply to the militia. *Id.* at 65-66 & n.8. *Heller*, however, characterized the *Lewis* dictum as "gratuitous[ ]," noting that "[n]o Second Amendment claim was raised or briefed by any party." 554 U.S. at 625 n.25. *Heller* held the Second Amendment to protect fundamental, individual rights and rejected rational basis review in relation to such rights. *Id.* at 623-28 & n.27. *See also, United States v. Vonxgay,* 594 F.3d 1111, 1116 n.1 (9th Cir. 2010) (discussing effect of *Heller* on *Lewis,* and suggesting that *Lewis* was not binding in relation to the defendant's Second Amendment challenge to enforcement of § 922(g)(1)).

The treatment of Mr. Reese's as applied challenge to § 922(g)(8) as a collateral attack on the order itself relieved the United States of the burden of demonstrating the constitutionality of Mr. Reese's indictment, in light of the 50-year duration of the Hawaii

Order. The "collateral attack" reasoning improperly removed from the constitutional analysis the most salient fact presented by Mr. Reese's as applied challenge: the fact that, in his case, enforcement of § 922(g)(8) effectuated a lifelong criminalization of gun possession under federal law. Accordingly, the Opinion never addressed the impact of the 50-year duration of the Hawaii Order on the constitutionality of Mr. Reese's indictment. The Court should not permit the mislabeling of as applied challenges as collateral attacks on the predicate orders.

In relation to statutes like § 922(g)(8), deflections of as applied challenges as "collateral attacks" on the order itself eliminate important facts from as applied analysis. This mistake makes the inquiry more abstract, therefore more like facial challenges, and therefore more favorable to the United States. *See, e.g., Salerno,* 481 U.S. at 745 ("A facial challenge to a Legislative act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *United States v. Grimmett*, 439 F.3d 1263, 1271 (10th Cir. 2006) (same). Excising the 50-year duration of the Hawaii Order from the as applied analysis of § 922(g)(8) dramatically distorted the outcome of the Second Amendment inquiry.

The Opinion compounds the unfairness of this effect in its reliance on the statistical and scholarly support for the government's interest, borrowed from *United States v. Skoien,* 614 F.3d 638 (7th Cir. 2010) (en banc). App. 22-24. None of the cited literature or

statistics concerns the risk of domestic gun violence posed by a person, like Mr. Reese, never found to have committed domestic abuse. None of it concerns parties who stipulate to protective orders. None of it purports to justify a 50-year prohibition on gun possession. Instead, the resources cited in the Opinion address, for example, the increased risk of homicide "in the home of a convicted domestic abuser," the high rate of recidivism among "domestic abusers," and the percentage of convicted domestic abusers who suspend their abusive conduct within three years of conviction. App. 22-24. "No matter how you slice these numbers, ***people convicted of domestic violence*** remain dangerous to their spouses and partners." App. 24 (quoting *Skoien*, 614 F.3d at 643-44 (emphasis added)).

Mr. Reese has never been convicted of, or found to have committed, domestic abuse. The as applied analysis conducted by the Tenth Circuit literally treated Mr. Reese as a criminal and thereby failed to analyze the constitutionality of § 922(g)(8) in the circumstances of Mr. Reese's case. This mistake relates to the Tenth Circuit's erroneous application of intermediate scrutiny because, as illustrated by *Chester*, being a felon or a misdemeanant disqualifies a defendant from claiming the "core" rights identified in *Heller*. *See Chester*, 628 F.3d at 683-84. Failing to account for the absence of a felony or misdemeanor conviction in Mr. Reese's case thus altered the as applied analysis and the choice of the level of scrutiny in favor of the United States.

The Opinion's reliance on the inapplicable prohibition against "collateral attacks" improperly eliminated from the analysis the 50-year duration of the Hawaii Order. Use of the sources cited in *Skoien* resulted in addressing Mr. Reese's case as if he had been convicted of a felony or misdemeanor domestic violence crime. The Opinion therefore conflicts with the precedents of this Court and other circuits demonstrating that Mr. Reese was entitled to have the constitutionality of his indictment judged under a test that recognizes that he is not a criminal and that the criminalization of firearm possession under § 922(g)(8) would last for 50 years.

The Lower Courts Require Guidance In The Rapidly Evolving Area Of Second Amendment Jurisprudence.

Mr. Reese's case underscores the necessity of this Court's guidance in the application of *Heller*. The *Heller* opinion understandably released a flood of litigation based on the Second Amendment because, before *Heller*, a notable dearth of Supreme Court precedents distinguished Second Amendment law. One commentator described the pre-*Heller* Second Amendment as "a sort of constitutional Loch Ness Monster: Despite occasional reported sightings, many people – and certainly most judges – were inclined to believe it did not exist." Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007-2008 Cato Sup. Ct. Rev. 127, 127 (2008). Following *Heller*, the task of addressing its

repercussions "threatens to suck the courts into a quagmire," according to Judge Wilkinson of the Fourth Circuit. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling of the Rule of Law*, 95 VA. L. REV. 253, 280 (2009).

The Court's decision in *Heller* not to say whether strict or intermediate scrutiny controls Second Amendment analysis has, in particular, engendered widespread dispute and uncertainty. *See, e.g.*, Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, American Constitution Society for Law and Policy (2010), available at http://www.acslaw.org/files/Mehr%20andWinkler%Standardless%Second%Amendment%.pdf, at 1 (noting that *Heller* and *McDonald* predictably created a wave of lawsuits across the country, that "lower courts have discovered that the Supreme Court failed to give them adequate guidance on how to resolve gun control controversies," and that the courts are using a variety of divergent standards in Second Amendment cases). "Second Amendment law is profoundly unsettled." *Id.*

Although the *Heller* opinion ruled out rational basis and the interest balancing test proposed in Justice Breyer's dissent, uncertainty about whether strict or intermediate scrutiny should apply in gun cases has spawned vigorous and scholarly debate. *See, e.g.*, Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J. L. & PUB. POLICY 203, 203-08 (2009) (describing and addressing several arguments relating to the appropriate level of scrutiny); Adam Winkler,

Scrutinizing the Second Amendment, 105 MICH. L. REV. 683, 686 (2007) (arguing that adoption of strict scrutiny would be inconsistent with state court precedents applying state constitutions); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply To Gun Control Laws?* 105 NW. U. L. REV. COLLOQUY 85, 85 (2010) (noting that "[l]ikely the most important piece of plumbing that will need to be installed is the standard of scrutiny . . . ").

Mr. Reese's case offers the Court an opportunity to supply a specific, but important, part of the necessary guidance. The Court should grant certiorari to clarify that strict scrutiny applies to judgments about the constitutionality of severe restrictions on the aspects of Second Amendment rights identified in *Heller* as constituting their core. The Court has granted certiorari in other instances to provide guidance for the lower courts. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 441-42 (1966) (noting that the Court had granted certiorari "to give concrete constitutional guidelines for . . . courts to follow" in the area of the privilege against self-incrimination); *Civil Aeronautics Bd. v. State Airlines*, 338 U.S. 572, 575 (1950) (noting that the Court had granted certiorari to provide future guidance to the Board); *Alcoa S.S. Co., Inc. v. United States*, 338 U.S. 421, 423 (1949) (explaining that the Court granted certiorari because determination of the issue presented would guide resolution of a large body of similar pending cases). The Court should review this case by certiorari to resolve the important question left open by *Heller*, at

least in relation to the core components of Second Amendment rights.

CONCLUSION

For the reasons stated above, the Court should grant Mr. Reese's petition.

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UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
JAMES OLIVER REESE,
Defendant-Appellee.

No. 10-2030

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

627 F.3d 792; 2010 U.S. App. LEXIS 25224

December 10, 2010, Filed

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. (D.C. No. 1:09-CR-02982-JEC-1).

COUNSEL: Elizabeth D. Collery, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C., (Lanny A. Breuer, Assistant Attorney General; Greg D. Andres, Acting Deputy Assistant Attorney General; Kenneth J. Gonzales, United States Attorney, District of New Mexico; Louis E. Valencia, Assistant United States Attorney, District of New Mexico, with her on the briefs), for Plaintiff-Appellant.

Jason Bowles of Bowles and Crow, (B. J. Crow of Bowles and Crow; William Marchiondo of Marchiondo Law Office, with him on the brief), Albuquerque, New Mexico, for Defendant-Appellee.

JUDGES: Before BRISCOE, Chief Judge, HOLLOWAY, and MURPHY, Circuit Judges.

OPINION BY: BRISCOE

OPINION

BRISCOE, Chief Judge.

This appeal presents a single issue, whether the district court erred in granting defendant James Reese's motion to dismiss an indictment which charged Reese with three counts of possessing firearms while subject to a domestic protection order, in violation of 18 U.S.C. § 922(g)(8). Reese successfully raised an as-applied challenge to the indictment on the grounds that § 922(g)(8) violated his Second Amendment right to keep and bear arms. The United States now appeals. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse the decision of the district court and remand for further proceedings.

I.

Factual background

In July 2003, Reese, his then-wife Jennifer Reese (Jennifer), and their three minor children moved to Honolulu, Hawaii, where Reese served in the Navy. In August 2004, Reese and Jennifer separated. On November 29, 2004, Jennifer filed in the State of Hawaii Family Court of the First Judicial Circuit (Hawaii Family Court) an "Ex Parte Petition For A Temporary Restraining Order For Protection And Statement" on behalf of herself and her three minor children. Aplt. App. at 104. In the petition, Jennifer alleged that she and Reese were "intimate partners" as defined by 18 U.S.C. § 921(a)(32), Aplt. App. at 105, that Reese had "physically harmed, injured or

assaulted" her by "pushing, grabbing, [and] shoving her" as well as "breaking [her] finger" by "holding [her] hand against [a] doorknob," *id.*, that Reese had "pointed a handgun at [her]" and threatened to kill her, *id.*, and that Reese "ha[d] subjected [her] to extreme psychological abuse by . . . yelling, refusing to allow sleep or waking repeatedly, repeated phone calls, threaten[ing] to take children if [she] left him," *id.* at 106. Jennifer further alleged that Reese was "an alcoholic," "ha[d] a history of domestic violence," was "extremely controlling," "ha[d] a bad temper," and "d[id] not accept the separation." *Id.* Jennifer also alleged that Reese owned firearms that could be used to threaten, injure or abuse another person. Less than a week after filing the motion for protective order, Jennifer formally filed for divorce in the Hawaii Family Court.

On February 23, 2005, the Hawaii Family Court held a hearing on Jennifer's motion for protective order. During the hearing, Reese "denie[d] [Jennifer's] allegations of domestic abuse," but nevertheless "agreed to [the imposition] of a restraining order. . . ." *Id.* at 109. Consequently, the Hawaii Family Court did not hear evidence from the parties or make any findings regarding Jennifer's allegations. Instead, the Hawaii Family Court concluded that Jennifer and Reese were "intimate partners," as defined in 18 U.S.C. § 921(a)(32), and issued a protective order in favor of Jennifer and against Reese. The order, which expressly stated it did not expire "until further order of the court," Aplt. App. at 109, prohibited Reese, in

pertinent part, from (a) threatening or physically abusing Jennifer or their minor children, (b) contacting Jennifer or their minor children, and (c) "possessing, controlling, or transferring ownership of any firearm, ammunition, firearm permit or license for the duration of th[e] Order or extension thereof," *id.* at 112. The order further revoked "[a]ll permits/licenses" that Reese had for firearms and required Reese to "immediately turn over all firearms, ammunition, permits and/or licenses to the Honolulu Police Department . . . for the duration of th[e] Order or extension thereof." *Id.* The order also stated that "[t]he terms and conditions of this Order were explained by the Court to the parties in open court" and that "[t]he parties acknowledged that they understood the terms and conditions of the order and the possible criminal sanctions for violating it." *Id.*

On March 17, 2005, the Hawaii Family Court held a final hearing on Jennifer's divorce petition, at the conclusion of which it found that the "marriage [wa]s irretrievably broken" and thus "dissolved" the marriage. *Id.* at 138. The Hawaii Family Court also signed a copy of a motion to amend the protective order that Reese had filed on February 23, 2005. In that motion, Reese's attorney handwrote a number of sentences modifying the terms under which Reese could contact Jennifer and the minor children. Most notably, the last handwritten sentence stated as follows: "The order for protection shall expire in 50 years or until either party modifies the same." *Id.* at 116.

In mid-2005, Jennifer and the three minor children moved to Maryland. At some point thereafter, Jennifer remarried. Reese relocated to Milan, New Mexico, and began working with his father, Oliver Reese, at his mining and exploration business in Milan. Reese also remarried.

In May 2009, Jennifer called Brandon Garcia, a special agent with the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF). Jennifer "was concerned because she thought her children were . . . scheduled to visit . . . their father, . . . Reese, in Milan, and she had reason to believe that he had firearms and was under an order of protection and prohibited from possessing firearms, and she was fearful for her children's safety." *Id.* at 63. Jennifer subsequently e-mailed Garcia a copy of the protective order issued by the Hawaii Family Court. Garcia "pulled some background information and looked into it as best [he] could," but "didn't find anything that would show that [Reese] was currently in possession of firearms. . . ." *Id.* Accordingly, Garcia called Jennifer back and "told her if there was anything [he] could do in the future to give [him] a call, but as of [that moment, he] couldn't really do anything." *Id.* at 63-64.

On June 27, 2009, a New Mexico State Police officer, Aaron Hammond, was dispatched to the New Mexico Police Department in Milan (Milan Police Department) "to take a report of domestic violence or domestic disturbance occurrence or report that had occurred the prior night. . . ." *Id.* at 32. At the police

department, Hammond encountered Reese's new wife, Danielle Boucher-Reese (Danielle), sitting with her disabled son, who was in a wheelchair. Danielle was "noticeably upset" and "had been crying." *Id.* Hammond observed that there were "bruises on [Danielle's] arms and on her hands" and that "she was noticeably trembling and shaking." *Id.* Hammond proceeded to interview Danielle, who "related a sequence of events of the previous night in which she and her family[, Danielle's two sons and Reese's seventeen-year-old daughter, J.M.,] were traveling from their residence in the Milan area to Albuquerque." *Id.* at 33. According to Danielle, she and Reese began arguing while en route to Albuquerque. At a certain point, Reese stopped the car, Danielle got out, and she and Reese proceeded to "g[e]t into a fight on the side of the road." *Id.* Ultimately, Reese "forced [Danielle] back in the vehicle, took away her cell phone, and wouldn't let her call the police." *Id.* J.M. "used her cell phone to contact her mother[, Jennifer,] back in Maryland," and Jennifer in turn contacted the Albuquerque police "to find out if they were all okay." *Id.* According to Danielle, the Albuquerque police pulled their car over in Albuquerque, but "she was too terrified to tell the police what was going on because she felt that he may hurt herself and her boys." *Id.* at 34. Danielle indicated that "[w]hen they did make it back to their residence later that night, she packed up the van and wanted to take both of her boys with her," but Reese "only allowed her to take her older disabled son and wouldn't let her take her two-year-old [son] with her." *Id.* J.M. also remained in

the residence with Reese. Danielle further indicated that she spoke with Jennifer later that evening and learned, for the first time, about Reese's alleged mistreatment of Jennifer and the existence of the protective order. Danielle then discussed the protective order with Hammond, and Danielle informed Hammond that there "were [guns] all over the[ir] house" and that she had "been purchasing guns for [Reese] because he ha[d] asked [her] to." *Id.* at 36. Danielle also described "a Smith & Wesson .50 cal[iber] Magnum handgun," which she said she had just purchased for Reese at a gun show in Arizona. *Id.*

Danielle consented to Hammond entering her residence and examining the guns. However, "she was concerned about [Hammond's] safety going into the house because she thought . . . Reese would become violent with [Hammond] if . . . [Hammond] knew of the [protective] order against [Reese]." *Id.* Danielle was also concerned about Reese abusing the children in the residence.

Hammond, together with an officer from the Milan Police Department, went to Reese's residence. Hammond knocked on the door of the residence, and Reese responded. Hammond "asked [Reese] if he wanted to go in and talk, and [Reese] said he would prefer if [they] could stand out . . . on the porch" of the residence. *Id.* at 38-39. Reese "said nothing had happened" the night before. *Id.* at 39. Reese conceded, upon questioning by Hammond, that he had "several" firearms in his house. *Id.* Hammond advised Reese of his Miranda rights and, with Reese's

consent, continued the questioning. When asked by Hammond if he was "aware of a [protective] order that prohibit[ed] [him] from having firearms," Reese responded, "Not that I'm aware of." *Id.* at 40. Hammond then placed Reese under arrest, handcuffed him, and escorted him to Hammond's patrol car. As Hammond did so, he again asked Reese, "Are you aware of a [protective] order out of Hawaii?" *Id.* at 41. Reese responded, "Where did you get that?" *Id.* Hammond then asked Reese, "Do you want to read the [protective] order?," to which Reese responded, "No. I know what it says." *Id.*

After placing Reese in the backseat of his patrol car, Hammond entered Reese's residence in order to check on the children inside. According to Hammond, he'd "never seen . . . a house so full of just hunting material in [his] entire life." *Id.* at 43. "In almost every corner of the house there was something to do with either archery, hunting, reloading, military clothing, equipment." *Id.* "There w[ere] three display cases of knives" and "Ziploc bags of different kinds of ammunition." *Id.* In the master bedroom of the house, Hammond observed "a gun laying in a partially opened gun bag next to a gun safe." *Id.*

After checking on the children inside Reese's residence, Hammond "contacted Danielle . . . and . . . a victim's advocate for her, . . . and advised them that [he] had . . . Reese in custody and for her to come and get her children with the victim's advocate." *Id.* at 44. Danielle and the victim's advocate arrived at the residence within a short time and began "packing up

the children's belongings and clothes . . . to take." *Id.* As Danielle was going through the items in the residence, she asked Hammond if he wanted to look inside of a large combination safe located in the master bedroom. Danielle proceeded to open the safe and removed from it the Smith & Wesson .50 caliber Magnum handgun that she had purchased for Reese. Also contained in the safe were approximately twenty-three additional firearms.

Shortly after Danielle and the victim's advocate arrived, an individual named Eddie Tan (Tan) arrived at the residence in his own vehicle. Hammond later learned that Reese, while sitting in the back of the patrol car, had used his cell phone (by dialing with his toes) to call Tan to request that he come to the residence. Tan "advised that he was there to get the keys to the business." *Id.* at 47. After questioning Reese and obtaining his express consent, Hammond accompanied Tan to Reese's pickup truck, which was parked at the residence. Tan first looked for the keys inside a black backpack that was located in the back cab of the truck. As Tan unzipped the backpack, he said, "Oops, I don't think you're supposed to see that." *Id.* at 48. Hammond, who was taller than Tan, "could see the grips of a handgun within the backpack that . . . Tan had opened up." *Id.* Tan proceeded to open another backpack located inside the cab of the truck, and as he did so, he stated, "Oh, you probably don't want to see that one either." *Id.* at 49. Hammond observed "the grip to another handgun" inside this second backpack. *Id.* Tan then opened one of the front

doors to the cab of the truck, and Hammond observed "boxes and bags of ammunition" contained "in the panels on the door. . . ." *Id.* Tan subsequently "found the keys that he was looking for in the center console area" of the truck. *Id.* Hammond in turn "inventoried th[e] two guns" he had observed in the backpacks. *Id.*

After completing his inventory of the firearms found at Reese's residence and in Reese's truck, Hammond transported Reese to police headquarters in Milan. As Hammond completed the necessary paperwork (e.g., booking paperwork, criminal complaints, and statements of probable cause), he spoke with Reese, who was seated nearby. Reese "rant[ed] about his ex-wife and how she had done this to him. . . ." *Id.* at 51. Reese also stated that he had "been collecting [firearms his] whole life" and that he couldn't "live without [his] guns." *Id.* at 52.

On June 29, 2009, Jennifer, Danielle, and Danielle's mother all telephoned ATF Special Agent Garcia regarding the incident that had occurred involving Reese. Garcia in turn contacted Hammond, who provided him with additional details of the events leading up to Reese's arrest. Based upon the information provided to him, Garcia prepared an affidavit for a search warrant for both Reese's residence and his place of business. Garcia presented the affidavit to a magistrate judge, who issued the requested search warrant on June 30, 2009. The warrant was executed the following day, July 1, 2009, by ATF agents and three New Mexico state police officers.

Approximately thirty-three firearms were seized from Reese's place of business.

Procedural background

On July 2, 2009, a criminal complaint was filed in federal district court charging Reese with one count of possessing firearms while subject to a domestic protection order, in violation of 18 U.S.C. § 922(g)(8). On October 8, 2009, a federal grand jury indicted Reese on three counts of possessing firearms while subject to a domestic protection order, in violation of § 922(g)(8). The first two counts alleged that Reese's possession of weapons occurred on or about June 27, 2009 (the two counts focused on Reese's possession of different weapons). The third count alleged that Reese's possession of weapons occurred "[f]rom on or about June 27, 2009, to on or about July 1, 2009. . . ." Aplt. App. at 11.

At some point after the indictment was returned, Reese filed a motion with the Hawaii Family Court seeking to modify the protective order. That motion was apparently denied by the Hawaii Family Court due to the pending criminal charges against Reese.

On November 9, 2009, Reese moved to dismiss the indictment on the grounds that § 922(g)(8) was unconstitutional on its face and as applied to him. The bulk of Reese's motion was devoted to arguing that the fifty-year duration of the protective order issued by the Hawaii Family Court violated his Second Amendment rights. The motion also asserted

that § 922(g)(8) was unconstitutional on its face and as applied to Reese. With respect to this latter argument, the motion emphasized that Reese had not been previously convicted of a felony or of a domestic violence misdemeanor.

On January 6, 2010, the district court held a hearing on Reese's motion to dismiss. At the outset, the district court tentatively concluded "that 18 United States Code Section 922(g)(8) is constitutional on its face" and thus asked the parties "to focus on [the] as-applied argument. . . ." Aplt. App. at 18. Reese's counsel argued that the Hawaii protective order was not "reasonable in scope and time" because of its fifty-year duration. *Id.* at 20. Reese's counsel further argued that the Hawaii protective order was problematic because it was not accompanied by any "findings of abuse" or any "conviction. . . ." *Id.* The government argued, in response, that Reese was effectively "attacking the order of protection collaterally," something he was precluded from doing "if the order of protection [wa]s facially valid. . . ." *Id.* at 22.

On January 13, 2010, the district court issued a written decision granting Reese's motion. The district court determined at the outset that "the constitutionality of § 922(g)(8) w[ould] be determined 'depending upon the government's ability to satisfy whatever level of means-end scrutiny is held to apply.'" Aplt. App. at 97 (quoting *United States v. Skoien*, 587 F.3d 803, 809 (7th Cir. 2009)). Turning to Reese's arguments, the district court rejected Reese's assertion that § 922(g)(8) was unconstitutional on its face. In

doing so, the district court concluded that "there [we]re indeed circumstances in which the statute's limitation on possession of firearms [wa]s narrowly tailored and, therefore, constitutionally valid." Aplt. App. at 99. With respect to Reese's as-applied challenge, however, the district court agreed with Reese. *Id.* According to the district court, "the 50-year Order of Protection" was not "narrowly tailored to serve the governmental interest of reducing domestic violence." *Id.* The district court also emphasized that Reese and Jennifer "live[d] across the United States" from each other and "ha[d] no in-person contact." *Id.* Consequently, the district court dismissed all three § 922(g)(8) counts pending against Reese.

II

In its appeal, the government challenges the district court's conclusion that 18 U.S.C. § 922(g)(8) is unconstitutional as applied to Reese because it violates his individual right to keep and bear arms as contained in the Second Amendment. "We review challenges to the constitutionality of a statute de novo." *United States v. Dorris*, 236 F.3d 582, 584 (10th Cir. 2000).

The statute under which Reese was indicted, § 922(g)(8), provides as follows:

> (g) It shall be unlawful for any person –
>
> * * *
>
> (8) who is subject to a court order that –

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[,]

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(8). The term "intimate partner," as employed in § 922(g)(8), "means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person." 18 U.S.C. § 921(a)(32).

It is beyond dispute that Reese falls within the scope of § 922(g)(8). To begin with, the parties agree that Reese was, and remains, subject to a protective order issued by the Hawaii Family Court. Further, it is undisputed that the protective order (a) was issued after a hearing of which Reese received actual notice and in which Reese had an opportunity to participate, (b) correctly noted that Reese and Jennifer qualified as "intimate partners" under 18 U.S.C. § 921(a)(32), (c) expressly restrains Reese from threatening or physically abusing Jennifer or their minor children, and (d) explicitly prohibits the use, attempted use, or threatened use of physical force by Reese against Jennifer or their minor children that would reasonably be expected to cause bodily injury (because it prohibits Reese from "physically abusing" Jennifer or their minor children).

Although Reese argued before the district court that § 922(g)(8) violated the Second Amendment and was unconstitutional on its face, the district court concluded otherwise, and Reese does not challenge this conclusion on appeal. In other words, Reese effectively concedes that the categorical ban set forth in § 922(g)(8) does not, on its face, violate the Second Amendment and is presumptively lawful. Thus, we

are left to address Reese's alternative argument, with which the district court agreed, that § 922(g)(8), as applied to Reese, is unconstitutional under the Second Amendment.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Approximately two years ago, in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the Supreme Court held that several "District of Columbia [statutes] prohibit[ing] . . . the possession of usable handguns in the home violate[d] the Second Amendment. . . ." 128 S. Ct. at 2787-88. In doing so, the Court concluded that the Second Amendment "confer[s] an individual right to keep and bear arms." *Id.* at 2799; *see id.* at 2797 (concluding that the operative clause of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation"). The Court noted, however, that this right "[wa]s not unlimited." *Id.* at 2816. Although the Court declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," *id.*, it emphasized that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," *id.* at 2816-17. In other words,

the Court suggested that the core purpose of the right was to allow "law-abiding, responsible citizens to use arms in defense of hearth and home."[1] *Id.* at 2821.

Heller thus "suggests a two-pronged approach to Second Amendment challenges" to federal statutes. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *see United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc).[2] Under this approach, a reviewing court first "ask[s] whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Marzzarella*, 614 F.3d at 89. "If it does not, [the court's] inquiry is complete." *Id.* "If it does, [the court] must evaluate the law under some form of means-end scrutiny." *Id.* "If the law passes muster under that standard, it is constitutional." *Id.* "If it fails, it is invalid." *Id.*

Applying that approach here, there is little doubt that the challenged law, § 922(g)(8), imposes a burden

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[1] In June of 2010, the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

[2] In *Skoien*, the Seventh Circuit, sitting en banc, effectively adopted a similar analytical framework in addressing a Second Amendment challenge to § 922(g)(9). In doing so, the en banc court, upon review of the panel's opinion, rejected both the approach and the result adopted by the panel. Notably, the district court in this case relied on the panel opinion in *Skoien* and did not have the benefit of the Seventh Circuit's subsequent en banc ruling.

on conduct, i.e., Reese's possession of otherwise legal firearms, that generally falls within the scope of the right guaranteed by the Second Amendment. Thus, we must proceed to the second part of the analysis and "evaluate [§ 922(g)(8)] under some form of means-end scrutiny." *Id.*

The Supreme Court did not specify in Heller precisely what level of scrutiny a reviewing court must apply to a challenged law. 128 S. Ct. at 2817-18 (holding that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," the District of Columbia's challenged ban "would fail constitutional muster"). Instead, the Court indicated only that the rational basis test is not appropriate for assessing Second Amendment challenges to federal laws. *Id.* at 2816 n.27 ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms."). Thus, we must apply some level of heightened scrutiny and, in doing so, must look to analogous cases for guidance on precisely what level to apply.

In recent months, both the Third and Seventh Circuits have applied intermediate scrutiny to Second Amendment challenges to federal firearm laws. In Marzzarella, the Third Circuit, citing analogous First Amendment cases, concluded that "[w]hether or not strict scrutiny may apply to particular Second Amendment challenges, it is not the case that it must

be applied to all Second Amendment challenges." 614 F.3d at 96. In other words, the Third Circuit concluded, "the Second Amendment can trigger more than one particular standard of scrutiny," depending, at least in part, upon "the type of law challenged and the type of [Second Amendment restriction] at issue." *Id.* at 97. The Third Circuit in turn concluded that the specific statute it was reviewing, 18 U.S.C. § 922(k), which prohibits the possession of firearms with obliterated serial numbers, "should be evaluated under intermediate scrutiny" because "[t]he burden imposed by the law d[id] not severely limit the possession of firearms," as did "[t]he District of Columbia's handgun ban" that was at issue in Heller. *Id.* Turning again to analogous First Amendment cases, the Third Circuit framed the intermediate scrutiny inquiry in this way: whether the challenged law served a "significant," "substantial," or "important" governmental interest, and, if so, whether the "fit between the challenged [law] and the asserted objective [wa]s reasonable, not perfect." *Id.* at 98. And, finally, the Third Circuit concluded that "[t]hose requirements [we]re met" because the purpose of § 922(k), i.e., "preserving the ability of law enforcement to conduct serial number tracing . . . constitute[d] a substantial or important interest," *id.*, and § 922(k) "fit[reasonably with that interest," *id.*, by "[r]egulating the possession of unmarked firearms – and no other firearms," *id.* at 99.

In *Skoien*, the Seventh Circuit sitting en banc, applied a similar test and reached a similar result with respect to a different statute, 18 U.S.C. § 922(g)(9), which prohibits any person "who has been convicted in any court of a misdemeanor crime of domestic violence" from possessing firearms. In doing so, the Seventh Circuit first inferred from Heller "that exclusions [on firearm possession] need not mirror limits that were on the books in 1791" and "that some categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court." *Skoien*, 614 F.3d at 641. In turn, the Seventh Circuit, citing cases involving analogous constitutional rights, concluded that § 922(g)(9) was subject to intermediate scrutiny and framed the inquiry in this way: whether the statute was "substantially related to an important governmental objective." *Id.* In answering that inquiry, the Seventh Circuit held that "the goal of § 922(g)(9), preventing armed mayhem, [wa]s an important governmental objective" and that "[b]oth logic and data establish[ed] a substantial relation between § 922(g)(9) and this objective." *Id.* at 642.

The initial question we must address is whether intermediate scrutiny is also appropriate for the statute challenged by Reese. To be sure, § 922(g)(8) is arguably more restrictive than § 922(k), the statute at issue in Marzzarella, in that it prohibits the possession of all types of firearms. On the other hand,

however, § 922(g)(8) is less restrictive than § 922(k) in that it applies only to a narrow class of persons, rather than to the public at large. And, in that regard, § 922(g)(8) is substantially similar to § 922(g)(9), the statute at issue in *Skoien*. Specifically, both statutes prohibit the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence. Based upon these characteristics, we conclude that § 922(g)(8), like the statutes at issue in *Marzzarella* and *Skoien*, is subject to intermediate scrutiny.

"To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). Here, the government asserts that the objective of § 922(g)(8) is to keep firearms out of the hands "of people who have been judicially determined to pose a credible threat to the physical safety of a family member, or who have been ordered not to use, attempt to use, or threaten to use physical force against an intimate partner or child that would reasonably be expected to cause bodily injury," Aplt. Br. at 21, because "[s]uch persons undeniably pose a heightened danger of misusing firearms," *id.* at 21-22. Reese does not seriously dispute the assertion. Moreover, the Seventh Circuit's decision in *Skoien*, though focused on § 922(g)(9) rather than § 922(g)(8), points to evidence that is

highly relevant to, and supportive of, the government's assertion that the restriction imposed by § 922(g)(8) is substantially related to an important government objective:

> That firearms cause injury or death in domestic situations also has been established. Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists. Linda E. Saltzman, James A. Mercy, Patrick W. O'Carroll, Mark L. Rosenberg & Philip H. Rhodes, Weapon Involvement and Injury Outcomes in Family and Intimate Assaults, 267 J. Am. Medical Ass'n 3043 (1992). Part of this effect stems from the fact that some would-be abusers go buy a gun, *see* Susan B. Sorenson & Douglas J. Wiebe, Weapons in the Lives of Battered Women, 94 Am. J. Pub. Health 1412 (2004), and much from the fact that guns are more lethal than knives and clubs once an attack begins. *See* [Franklin E. Zimring, Firearms, Violence, and the Potential Impact of Firearms Control, 32 J.L. Med. & Ethics 34 (2004) (collecting studies)]. The presence of a gun in the home of a convicted domestic abuser is "strongly and independently associated with an increased risk of homicide." Arthur L. Kellermann, et al., Gun Ownership as a Risk Factor for Homicide in the Home, 329 New England J. Medicine 1084, 1087 (1993). *See also, e.g.*, Jacquelyn C. Campbell, et al., Risk Factors for Femicide in Abusive Relationships: Results from a

Multisite Case Control Study, 93 Am. J. Pub. Health 1089, 1090 (2003); James E. Bailey, et al., Risk Factors for Violent Death of Women in the Home, 157 Archives of Internal Medicine 777 (1997); Douglas J. Wiebe, Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study, 41 Annals of Emergency Medicine 771 (2003). And for this purpose the victims include police as well as spouses, children, and intimate partners. Responding to a domestic-disturbance call is among an officer's most risky duties. Approximately 8% of officers' fatalities from illegal conduct during 1999 through 2008 arose from attempts to control domestic disturbances. FBI, Law Enforcement Officers Killed and Assaulted 2008 Table 19 (2009).

Finally, the recidivism rate is high, implying that there are substantial benefits in keeping the most deadly weapons out of the hands of domestic abusers. For example, a study of persons arrested for misdemeanor domestic violence in Cincinnati concluded that 17% of those who remained in the area were arrested again for domestic violence within three years. John Wooldredge & Amy Thistlethwaite, Reconsidering Domestic Violence Recidivism: Individual and Contextual Effects of Court Dispositions and Stake in Conformity vi (1999). The full recidivism rate includes violence that does not lead to an arrest. Estimates of this rate come from survey research and range from 40% to 80% "when victims are followed longitudinally

> and interviewed directly." Carla Smith Stover, Domestic Violence Research, 20 J. Interpersonal Violence 448, 450 (2005). *See also* Julia C. Babcock, et al., Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment, 23 Clinical Psychology Rev. 1023, 1039 (2004) (estimating a 35% recidivism rate based on partners' reports). Skoien cites, as if it were favorable, a study showing that within three years of conviction 48% of domestic abusers "suspended" their abusive conduct – which means that the other 52% did not, and that even the 48% may have committed new crimes within three years after conviction. John H. Laub & Robert J. Sampson, Understanding Desistance from Crime, 28 Crime & Justice 1, 31 (2001). No matter how you slice these numbers, people convicted of domestic violence remain dangerous to their spouses and partners.

614 F.3d at 643-44.

Our next task is to "determine whether § 922(g)([8]) is substantially related to this objective in [Reese]'s case." *Williams*, 616 F.3d at 693. As to this question, the government asserts that Reese cannot "demonstrate that he belongs to a severable subcategory of persons as to whom the statute is unconstitutional." Aplt. Br. at 34. More specifically, the government asserts that Reese is subject to a protective order that undisputedly satisfies the requirements of § 922(g)(8), including "the procedural protections specified by Congress," *id.* at 35, and

Reese is precluded from collaterally attacking, in the context of this federal criminal proceeding, the merits or validity of the underlying protective order.

We agree with the government. It is undisputed that Reese is subject to a protective order issued by the Hawaii Family Court and that the protective order satisfies the requirements of § 922(g)(8) because (a) it was issued after a hearing for which Reese received actual notice and in which Reese had an opportunity to participate, (b) it restrains Reese from harassing, stalking, or threatening Jennifer or their minor children, and (c) by its terms it explicitly prohibits the use, attempted use, or threatened use of physical force against Jennifer or their minor children. *See* 18 U.S.C. § 922(g)(8)(A), (B), and (C)(ii). Although there was no underlying finding by the Hawaii Family Court regarding the legitimacy of Jennifer's allegations of past abuse and, in turn, no factual "finding that [Reese] represent[ed] a credible threat to the physical safety of" Jennifer or their minor children, *id.* § 922(g)(8)(C)(i), no such findings were necessary for § 922(g)(8) to apply to Reese because the protective order explicitly prohibited the use, attempted use, or threatened use of physical force against Jennifer and their minor children, *id.* § 922(g)(8)(C)(ii). *See United States v. Emerson*, 270 F.3d 203, 213-14 (5th Cir. 2001) ("If the requirements of [§] 922(g)(8)(A) and (B) are fulfilled, then by its terms [§] 922(g)'s firearms disability attaches if either clause (C)(i) *or* clause (C)(ii) applies."). Moreover, no such findings were necessary because Reese

agreed, during the hearing on Jennifer's motion for protective order, to the imposition of the protective order.[3] We thus conclude that the prosecution of Reese under § 922(g)(8) is consistent with the government's intended purpose in implementing that statute.[4]

The government is also correct in noting that the overwhelming weight of federal case law precludes a defendant in a § 922(g)(8) prosecution from mounting a collateral attack on the merits of the underlying state protective order. Although not every circuit has expressly addressed the question, every circuit that has done so has agreed "that protective orders satisfying the Section 922(g)(8) requirements are analogous

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[3] By agreeing to the imposition of the protective order, Reese arguably waived his Second Amendment rights, since the order expressly prohibited him from possessing firearms and indeed required him to turn over any firearms and ammunition to Hawaii law enforcement officials. Moreover, it is clear from the record that Reese was well aware of the restrictions placed on him by the protective order as well as the impact of that protective order under federal firearms laws.

[4] Even if we were to apply a strict scrutiny test requiring the government to prove that § 922(g)(8) is narrowly tailored to further a compelling interest, see *Federal Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 476, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007), we are persuaded, for essentially the reasons outlined above, that the government could satisfy these requirements. In particular, the government's interest in preventing armed domestic violence is compelling and the specific requirements outlined in § 922(g)(8) are narrowly tailored to ensure that only persons subject to specific types of domestic protection orders are subject to restrictions on their Second Amendment rights.

to felony convictions for the purposes of the statute's restraint on the possession of firearms" and that, consequently, a defendant may not challenge the validity of the underlying state court protective order in a § 922(g)(8) prosecution. *United States v. DuBose*, 598 F.3d 726, 733 (11th Cir. 2010); *see United States v. Wescott*, 576 F.3d 347, 354 (7th Cir. 2009); *United States v. Arledge*, 220 F. App'x 864, 867 (10th Cir. 2007)[5]; *United States v. Young*, 458 F.3d 998, 1005 (9th Cir. 2006); *United States v. Hicks*, 389 F.3d 514, 534 (5th Cir. 2004); *United States v. Baker*, 197 F.3d 211, 216-17 (6th Cir. 1999); *Emerson*, 270 F.3d at 263-64; *see also Seling v. Young*, 531 U.S. 250, 263-64, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001) ("Permitting respondent's as-applied challenge would invite an end run around the Washington Supreme Court's decision that the Act is civil in circumstances where a direct attack on that decision is not before this Court."); *Lewis v. United States*, 445 U.S. 55, 60-61, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980) (holding that, under the plain meaning of the federal statute prohibiting felons from possessing firearms, "the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action").

Although Reese argued below, and the district court agreed, that the underlying protective order in

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[5] We have not, to date, issued a published decision reaching this conclusion.

this case was infirm due to its purported fifty-year length and because Reese no longer presented a legitimate threat to Jennifer due to the significant distance between their current residences, those concerns are simply not relevant in these federal criminal proceedings, even for purposes of considering Reese's as-applied challenge to § 922(g)(8). Instead, any such challenges could and should have been raised by Reese in the Hawaii Family Court.

As for the district court's as-applied analysis, the court erred in focusing on the underlying protective order issued by the Hawaii Family Court instead of the challenged federal statute. For the reasons explained above, it was improper for the district court to engage in what was effectively a collateral review of the protective order. Moreover, the district court made no attempt to engage in the type of scrutiny that is typically considered in as-applied challenges to federal laws. Thus, the district court's order granting Reese's motion to dismiss the indictment must be reversed and the case remanded for further proceedings, i.e., to allow Reese's prosecution under the indictment.

REVERSED and REMANDED for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No. 09-CR-2982 JC**

JAMES OLIVER REESE,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Jan. 13, 2010)

THIS MATTER comes before the Court on Defendant James Oliver Reese's Motion to Dismiss (Doc. 23), filed November 9, 2009 ("Motion"). Having reviewed the parties' submissions, the relevant case law, and having heard oral argument on January 6, 2010, I find the Motion is well-taken and should be granted.

I. BACKGROUND

Defendant's divorce from Jennifer Reese, who is now remarried and known as Jennifer May, was finalized May 11, 2005 in Hawaii. On February 23, 2005, the Hawaii Court entered an Order of Protection pursuant to Jennifer Reese's Ex Parte Petition for a Temporary Restraining Order as part of the divorce. The Order of Protection provides that Defendant agreed to the restraining order but denied

Jennifer Reese's allegations of abuse. *Motion* at Ex. C, p. 1. As a result, no finding of abuse was made. *Id.* The Order of Protection further prohibits Defendant "from possessing, controlling, or transferring ownership of any firearm, ammunition, firearm permit or license for the duration of this Order or extension thereof." *Id.* at 4.

On March 17, 2005, the Order of Protection was amended by Defendant's attorney at the time to provide that Defendant was permitted "unsupervised and immediate telephone contact with the parties' minor children." *Motion* at Ex. E, p. 1. The last sentence of the amended order, handwritten by Defendant's attorney at the time, provides that "[t]he order for protection shall expire in 50 years or until either party modifies the same." *Id.* at 2. Contrary to this language, Defendant contends it was his understanding that the Order would last for six months. *Motion* at Ex. F, 13.

On June 27, 2009, the New Mexico State Police found approximately 18 firearms at Defendant's residence, including two handguns in Defendant's vehicle, while responding to a domestic dispute involving Defendant and his new wife, Danielle Reese, *Motion* at 2; *Resp.* at 3, A total of 33 firearms were seized from Defendant's place of business pursuant to a search warrant executed by the ATF on July 1, 2009. Defendant is being prosecuted for possessing a firearm in violation of 18 U.S.C. § 922(g)(8). *Redacted*

Indictment (Doc. 15). This statute provides, in relevant part:

> (g) It shall be unlawful for any person –
>
> (8) who is subject to a court order that –
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate,
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such infuriate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury

> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Defendant challenges the constitutionality of 18 U.S.C. § 922(g)(8) both on its face and as it is applied to him. In support of this second argument, Defendant focuses mainly on the fact that the Order of Protection is not temporary but is, by virtue of its 50-year term, effectively a lifetime ban on his right to bear arms. Although Defendant initially mounted several collateral attacks to the validity of the Protection Order in his Motion, these arguments were abandoned in his Reply Brief. *Reply* at 1 (limiting asserted grounds for dismissal of indictment to (1) unconstitutionality § 922(g)(8) on its face and (2) unconstitutionality of § 922(g)(8) as applied to Defendant).

II. LEGAL STANDARD

Federal Rule of Criminal Procedure 12(b)(2) states that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." FED.R.CRIM.P. 12(b)(2). A party must raise before trial "a motion [that] alleged a defect in the indictment or information – but at any time while the case is pending, the court may hear a claim that the indictment

or information fails to invoke the, court's jurisdiction or to state an offense[.]" FED.R.CRIM.P. 12(b)(3).

When challenging the constitutionality of a statute, a defendant may challenge the statute either on its face, or as the statute is applied to a defendant's particular circumstances. "A facial challenge is a head-on attack on the legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications. An as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." *United States v. Pruitt,* 502 F.3d 1154, 1171 (10th Cir. 2007), *vacated on other grounds, Pruitt v. United States,* 128 S.Ct. 1869, 170 L.Ed.2d 741 (2008).

Defendant "may only succeed in a facial challenge to the constitutionality of a statute by 'establishing that no set of circumstances exists under which the Act would be valid.'" *Washington State Grange v. Washington State Republican Party,* ___ U.S. ___, 128 S.Ct. 1184, 1190 & n. 6, 170 L.Ed.2d 151 (2008) (citing *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Acknowledging criticism of the *Salerno* standard, including criticism from within the Supreme Court, the Court has set forward an alternative standard, noting that "all [Members of the Court] agree that a facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Id.* (citing *Washington v. Glucksberg,* 521 U.S. 702, 739-740, and n. 7, 117 S.Ct.

2258, 138 L.Ed.2d 772 (1997) (STEVENS, J., concurring in judgments)).

III. DISCUSSION

The Second Amendment provides that "[a] well-regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed." In *United States v. Heller,* the Supreme Court ruled that the meaning of the operative clause of the Second Amendment is to "guarantee the individual right to possess and carry weapons in case of confrontation." ___ U.S. ___, 128 S.Ct. 2783, 2797, 171 L.Ed.2d 637 (2008). The Tenth Circuit has recognized that *Heller* held that "the Second Amendment provides an individual with a right to possess and use a handgun for lawful purposes within the home." *United States v. McCane,* 573 F.3d 1037, 1047 (10th Cir. 2009). The right is individual in nature and unrelated to a person's service in any kind of armed force. *Heller,* 128 S.Ct. at 2797-2816.

It is not, however, unlimited. The Supreme Court specifically noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2817. Further, the Supreme Court noted that this list of

"presumptively lawful" limitations was not meant to be exhaustive. *Id.* at 2817, n.26.

The Tenth Circuit has relied on this dicta from *Heller* to find that 18 U.S.C. § 922(g)(1), which prohibits possession of firearms by convicted felons, is constitutional *post-Heller*. *McCane,* 573 F.3d at 1047 (quoting *Heller,* 128 S.Ct. at 2817). *See also United States v. Nolan,* No. 08-6246, 2009 WL 2488159 (10th Cir., Aug. 17, 2009) (same); *United States v. Gieswein,* No. 08-6113, 2009 WL 2837433 at *2 (10th Cir., Sept. 4, 2009) (declining to consider further argument that § 922(g)(1) is unconstitutional in light of *Heller* because of the Tenth Circuit's prior holding in *McCane*).

Other circuit courts of appeal have similarly followed the dicta in *Heller* and upheld § 922(g)(1) as constitutional without significant analysis of the statute. *See, e.g., United States v. Anderson,* 559 F.3d 348, 352 & n.6 (5th Cir. 2009).

Where other provisions of § 922 are at issue, provisions that are not specifically mentioned by the Supreme Court in the *Heller* dicta, a more complete analysis is in order.[1] For instance, the Seventh Circuit

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[1] Circuit Judge Tymkovich laments the lack of analysis even of the felon in possession law. In *McCane*, he "wonder[s] whether Second Amendment law would have been better served if the regulations *Heller* addressed in dicta had been left to later cases." *McCane,* 573 F.3d at 1050 (Tymkovich, Circuit Judge, concurring). Indeed, if lower courts were free to consider the constitutionality of the felon in possession law, Tymkovich notes

(Continued on following page)

criticized the government's reliance on the *Heller* dicta in *United States v, Skoien*, 587 F.3d 803, 805 (7th Cir. 2009) ("*Heller* held that the Second Amendment secures an individual natural right to possess firearms for self-defense; the opinion's reference to exceptions cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights"). The Seventh Circuit ultimately vacated and remanded the defendant's conviction pursuant to § 922(g)(9) for possessing firearms after a conviction for misdemeanor domestic violence. *Id.* at 806. Indeed, the *Heller* dicta may not even apply to § 922(g)(8), which was enacted in 1996 – thus, it is hardly a "longstanding prohibition[ ] on the possession of firearms." *See, e.g., United States v. Luedtke*, 589 F.Supp.2d 1018, 1021 (E.D.Wis. 2008).

I find that the Seventh Circuit's analytical framework in *Skoien* is both legally sound and appropriate for resolving Defendant's challenge to the constitutionality of § 922(g)(8). Therefore, the constitutionality of § 922(g)(8) will be determined "depending upon the government's ability to satisfy whatever level of means-end scrutiny is held to apply." *Id.* at 809. In *Skoien,* for example, intermediate scrutiny was applied because the defendant's possession of firearms was for the purpose of hunting and "the core

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that § 922(g)(1) may not survive scrutiny where the underlying felony is non-violent. *Id.* at 1049.

right of self-defense identified in *Heller* [wa]s not implicated." *Id.* at 805.

A. Section 922(g)(8) is Constitutional On Its Face

Other federal district courts have considered the constitutionality of § 922(g)(8) post-*Heller* and found it constitutional. Judge D. Brock Hornby of the Federal District of Maine applied roughly the same analysis as the Seventh Circuit in *Skoien,* distinguishing § 922(g)(8) from the outright ban on firearms at issue in *Heller. United States v. Knight,* 574 F.Supp.2d 224, 226 (D.Maine 2008) ("the prohibition lasts only as long as the underlying state court order is in effect"). Holding that reducing domestic violence is a compelling government interest, the court found that the temporary prohibition of firearms in § 922(g)(8) was narrowly tailored to serve that interest.

Although he did not apply the Seventh Circuit's analysis in *Skoien,* Judge Lynn Adelman of the Eastern District of Wisconsin held that § 922(g)(8) was constitutional because it "represent[ed] the *type[ ]* of regulation[ ] that pass[ed] constitutional muster." *Luedtke,* 589 F.Supp.2d at 1021 (emphasis in original). Judge Adelman noted the United States' history of barring individuals from access to weapons "based on the societal determination that such individuals pose a particular danger." *Id.* At the time of the Lautenberg Amendment to the Gun Control Act,

which gave rise to § 922(g)(8), Judge Adelman referenced Congressional evidence that "nearly 65 percent of all murder victims known to have been killed by intimates were shot to death" and that there were 150,000 instances of household violence involving firearms. *Id.* at 1022 (quoting from 142 Cong.Rec. S10379 (daily ed. Sept. 12, 1996) (statement of Sen. Murray) and 142 Cong.Rec. S8831 (daily ed. July 25, 1996)(statement of Sen. Lautenberg), respectively). Judge Adelman rejected the defendant's argument that § 922(g)(8) was unconstitutional post-*Heller*, stating that "[n]othing in *Heller* suggests that Congress may not – based on further experience and study – close such loopholes, adding to the list of dangerous individuals historically barred from firearm possession." *Id.* at 1023.

Though Judge Adelman did not formally apply any means-end analysis in *Luedtke*, he indicated that § 922(g)(8) would nonetheless survive strict scrutiny. *Id.* at 1025. "Reducing domestic violence is a compelling government interest, and 922(g)(8)'s temporary prohibition, while the state court order is outstanding, is narrowly tailored to that compelling interest." *Id.* (quoting *United States v. Erwin*, No 1:07-CR-556, 2008 WL 4534058, at *2 (N.D.N.Y. Oct. 6, 2008) (internal citations omitted)).

These decisions demonstrate "the plainly legitimate sweep" of § 922(g)(8) and show there are indeed circumstances in which the statute's limitation on possession of firearms is narrowly tailored and, therefore, constitutionally valid.

B. Section 922(g)(8) As Applied to Defendant

Knight and *Luedtke* also illustrate how the statute is unconstitutional as applied to Defendant. In contrast to the restraining orders at issue in *Knight* and *Luedtke*, the 50-year Order of Protection in the present case is less narrowly tailored to serve the governmental interest of reducing domestic violence. The maximum duration of the Wisconsin order at issue in *Luedtke* was only four years. 589 F.Supp.2d at 1024.

Beyond the length of the Order in the present case, there is also the fact that Jennifer May, whom the Order was intended to protect, lives across the United States in Maryland, and the two, who were divorced four years ago and who are both remarried, have no in-person contact. The Order in the present case is simply not narrowly tailored to achieve the compelling governmental purpose of preventing domestic violence between Defendant and Jennifer May.

IV. CONCLUSION

Finding that the statute, 18 U.S.C. § 922(g)(8), under which Defendant is indicted is unconstitutional as applied to Defendant, the Court GRANTS Defendant's Motion to Dismiss (Doc. 23), filed November 9, 2009. All three counts pending against Defendant will be dismissed.

DATED: January 12, 2010.

s/ John Edwards Conway
SENIOR UNITED STATES
DISTRICT JUDGE

Counsel for Plaintiff:

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Counsel for Defendant:

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JAMES OLIVER REESE,

Defendant-Appellee.

No. 10-2030
(D.C. No. 1:09-CR-02982-JEC-1)

ORDER

(Filed Feb. 7, 2011)

Before **BRISCOE**, Chief Judge, **HOLLOWAY**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court he polled, that petition is also denied.

Entered for the Court,
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

(Rev. 5/22/04 Act4-04)

IN THE FAMILY COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

JENNIFER E. REESE, Petitioner (Plaintiff), vs. JAMES O. REESE, Respondent (Defendant).	FC-DA NO. 04-1-2332 ORDER FOR PROTECTION Hearing Date: FEB 23 2005 Judge: R. MARK BROWNING This Order expires on: Until further order of the Court

ORDER FOR PROTECTION

(Filed Feb. 23, 2005)

Parties present at the hearing:

[X] Plaintiff
[X] Defendant

Other persons present at the hearing:

[X] Plaintiff's attorney M. Worsham
[X] Defendant's attorney C. Branley
[X] Other A. Oue, Adult Services Branch

Pursuant to HRS Chapter 586, a hearing on Plaintiff's petition for an Order for Protection (Protective Order) was heard on the date indicated above.

The Court has jurisdiction over the parties and this matter and defendant was provided with notice and given an opportunity to be heard.

[ ] After full consideration of the facts and evidence, the Court finds that the Plaintiff has proven the material allegations of the petition and that the Defendant has failed to show cause why the order should not issue and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse.

[X] The Defendant has agreed to a restraining order, [X] but denies the Plaintiff's allegations of domestic abuse, and [X] no finding of abuse is herein made.

[X] Plaintiff and Defendant are spouses, former spouses, parents of a common child, cohabitants or former cohabitants. Therefore, they are "intimate partners" as defined by 18 USC Section 921(a)(32).

I do hereby certify that this is a [illegible], true and correct copy of the original on file in this office

/s/ [Illegible]
Clerk, Family Court,
First Circuit State of Hawaii

The parties cannot together agree to change any part of this order without a prior court order. The Plaintiff cannot alone change or decide not to enforce this Order without a prior court order. The Plaintiff is prohibited by HRS Section 702-222 from intentionally soliciting or aiding the

Defendant in violating this Order by failing to report a violation, by initiating contact, by allowing contact or by coming within the prohibited distances of the Defendant (unless otherwise provided for by this Order.)

Any participation by the Plaintiff to solicit or aid the Defendant's violation of this Order is not a defense to any criminal prosecution against any part for a violation of this Order.

Good cause appearing therefore,

IT IS HEREBY ORDERED that this Family Court Order for Protection is issued pursuant to HRS Section 586-55, and remains in effect until the expiration date indicated in the right-hand caption on page one.

IT IS FURTHER ORDERED that:

A. THREATS AND ABUSE

1 Defendant is prohibited from threatening or physically abusing the Plaintiff or anyone living with the Plaintiff and shall not maliciously damage any property of the Plaintiff or property of the Plaintiff's household. This includes, but is not limited to, prohibition of the use, attempted and/or threatened use of physical force against Plaintiff or any child of the Plaintiff or Defendant who resides with Plaintiff that would reasonably be expected to cause bodily injury. [See 18 USC Section 922(g)(8)]

B. CONTACT BETWEEN PARTIES

2 Defendant is prohibited from contacting the Plaintiff.

3 Defendant is prohibited from telephoning, writing or otherwise electronically communicating (by recorded message, pager, etc.), including through third parties, with the Plaintiff and any children residing with the Plaintiff.

4 Defendant is prohibited from coming or passing within 100 yards of any place of employment or where the Plaintiff lives and within 100 feet of each other at neutral locations. In the event the parties happen upon each other at a neutral location, the subsequent arriving party shall leave immediately or stay at least 100 feet from the other. When the parties happen upon each other at the same time at a neutral location, the Defendant shall leave immediately or stay at least 100 feet from the Plaintiff. Do not violate this order even if the Plaintiff invites you to be at the place of employment or where the other lives.

5 Notwithstanding the foregoing Order, [X] Defendant may have LIMITED contact with the Plaintiff ~~by telephone~~ in person for the purpose of [ ] visitation [ ] counseling or [X] court proceedings in courtroom and limited contact for service of legal documents by mail or through a process server. Parties allowed limited contact through counsel.

6 Defendant is prohibited from contacting the following:
Jennifer E. Reese
Victoria L. Reese
Kimberly M Reese
Rebecca A. Reese

7 Plaintiff shall promptly report any violation of this Order to the [X] Police Department (phone 911) [X] Military Police Department.

C. TEMPORARY CUSTODY AND VISITATION

8 [ ] Plaintiff [ ] Defendant shall have temporary legal and physical custody of the parties' minor children:

Name	Sex:	Age:
VICTORIA L. REESE	F	13 years
KIMBERLY M. REESE	F	10 years
REBECCA A. REESE	F	8 years

Custody and visitation pursuant to FC-D 04-1-3762 until the expiration date of this Order or amendment of this Order.

9 [ ] Plaintiff [X] Defendant shall have visitation with the minor children as follows: [ ] Pursuant to attached exhibit [X] supervised visitation; [X] with Andrea Barayuga

D. SERVICES AND DOMESTIC VIOLENCE INTERVENTION

__ [ ] Plaintiff [ ] Defendant shall attend and fully participate in domestic violence intervention at or as directed by [ ] Child and Family Service/ Developing Options to Violence Program [ ] PACT/Family Peace Center [ ] _____

__ [ ] Plaintiff [ ] Defendant shall arrange for substance abuse assessment at [ ] Castle Medical Center Alcoholism Program [ ] _____ and if recommended, fully participate in treatment/counseling until clinically discharged.

__ [ ] Plaintiff [ ] Defendant shall attend each and every session unless excused by the therapist and/or until clinically discharged. Party(ies) shall contact the appropriate program within one week of the hearing. Party(ies) to pay for services.

SERVICE PROVIDERS are requested to provide the court with a written report which will reflect the dates of contact, dates of unexcused absences, and any recommendation for further domestic violence intervention or treatment/counseling.

THE PARTIES' FAILURE to attend and fully participate in domestic violence intervention or treatment/counseling program(s) shall be referred to the Prosecutor for criminal charges for non-compliance of court-ordered intervention/treatment/counseling.

E. OTHER ORDERS

__ [ ] Plaintiff [ ] Defendant shall vacate the residence and premises located at _____ no later than _____ , 19 ___. [ ] Plaintiff [ ] Defendant is awarded exclusive occupancy of said residence.

10 [ ] Plaintiff [X] Defendant may with police escort pick up such personal belongings on Saturday March 5, 2005 between the hours of 10:00 am and 12:00 pm.

F. NO FIREARMS [HRS Section 134-7(f); 18 USC Section 922(g)(8)]

11 Defendant is prohibited from possessing, controlling or transferring ownership of any firearm, ammunition, firearm permit or license for the duration of this Order or extension thereof. All Permits/Licenses are hereby revoked. Defendant shall immediately turn over all firearms, ammunition, permits and/or licenses to the Honolulu Police Department (Firearms Unit, Main Station 801 S. Beretamia Street, 1st Floor) for the duration of this Order or extension thereof.

12 Defendant shall provide a copy of this Order to Defendant's chief, commanding officer or administrator whose name and address are as follows: Command Master Chief, David Selmier, USS Paul Hamilton, DDG60, Pearl Harbor, Hawaii 96818

Information on person to surrender firearms/permits, etc.,
Name: James D. Reese
Address: USS Paul Hamilton, Pearl Harbor, Hawaii 96818
Date of Birth: July 31, 1966 Telephone No. Unknown
Social Security Number: [SOCIAL SECURITY NUMBER OMITTED]

WARNING: Possession, transportation or receipt of firearms while this order is in effect may be a felony under federal law punishable by up to 10 years in prison/or $250,000 fine, 18 USC Section 922(g)(8).

13 The terms and conditions of this Order were explained by the court to the parties in open court. The parties acknowledged that they understood the terms and conditions of the order and the possible criminal sanctions for violating it. The Parties have notice of his Order.

__ Defendant, not present in court, shall be personally served with this Order.

A copy of this Order shall be released to the appropriate law enforcement and school authorities as well as other persons who have a need to review or possess a copy of the Order in order to enforce the terms and conditions of this Order.

THIS PROTECTIVE ORDER IS ENFORCEABLE IN ALL 50 STATES, DISTRICT OF COLUMBIA, U.S. TERRITORIES, AND TRIBAL LANDS [18 USC SECTION 2265]. INTERSTATE VIOLATION OF THIS ORDER IS SUBJECT TO FEDERAL CRIMINAL PROSECUTION [18 USC SECTION 2261(g), 2261A and 2262].

ANY VIOLATION OF THIS FAMILY COURT PROTECTIVE ORDER IS A MISDEMEANOR, WHICH MAY BE PUNISHABLE BY IMPRISONMENT OF UP TO ONE(1) YEAR AND/OR A FINE OF UP TO $1,000 [HAWAI'I REVISED STATUTES SECTION 586-11].

POLICE SHALL ENFORCE THIS ORDER.

DATED: Honolulu, Hawai'i, FEB 23 2005.

/s/ R. Mark Browning
JUDGE OF THE ABOVE-ENTITLED COURT
R. MARK BROWNING

STATE OF HAWAII FAMILY COURT FIRST CIRCUIT	**PROOF OF SERVICE**	CASE NUMBER FC-DA NO 04-1-2332

JENNIFER E. REESE,
Plaintiff/Petitioner
vs.
JAMES O. REESE,
Defendant-Respondent.

I served a certified copy of each document identified below by delivering to the following person(s):

PERSON(S) SERVED	DATE	TIME
JAMES O. REESE /s/ James Reese	23 FEB 05	1545

PLACE

FAMILY COURT, FIRST CIRCUIT
2nd FLOOR, KA'AHUMANU HALE
777 PUNCHBOWL STREET
HONOLULU, HAWAI'I 96813

DOCUMENTS SERVED

[ ] EX PARTE PETITION FOR A TEMPORARY RESTRAINING ORDER FOR PROTECTION AND STATEMENT; TEMPORARY RESTRAINING ORDER; NOTICE OF HEARING

[ ] AMENDED NOTICE OF HEARING

[X] ORDER FOR PROTECTION

PLEASE EXPEDITE RETURN OF SERVICE TO FAMILY COURT

DATE	COURT OFFICER'S SIGNATURE	BADGE ID NUMBER
2/23/05	/s/ Amy Oue	—

[ ] UNSERVED DOCUMENTS: I certify that, despite due and diligent search, I was unable to locate persons upon whom service was ordered, and therefore the attached documents are being returned as unserved.

1F-D 294 PROOF OF SERVICE

CHERYL BRANLEY 4489
1136 UNIM MALL, Suite 808
Honolulu, HI 96813
TEL: 533-0066
Movant/Attorney for: Defendant

IN THE FAMILY COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Jennifer E. Reese, Petitioner (Plaintiff) vs. James O. Reese, Respondent (Defendant).	FC-DA No. 04-1-2332 ORDER [ ] GRANTING [ ] DENYING [ ] IN PART [ ] CONTINUING [ ] MOTION TO (✓) AMEND ( ) DISSOLVE EXISTING ORDER FILED: February 23, 2005 HEARING: 3/17/05 JUDGE: R. Mark Browning (Filed Mar. 17, 2005)

ORDER [ ] GRANTING [ ] DENYING [ ] d IN PART
[ ] CONTINUING

MOTION TO [✓] AMEND [ ] DISSOLVE EXISTING ORDER FILED February 23, 2005

PRESENT:

[✓] M. Worsham Atty/Petitioner (Plaintiff)
(__Movant) [ ] Petitioner (Plaintiff)

[✓] C. Branley Atty/Petitioner (Plaintiff) (__Movant) [ ] Petitioner (Plaintiff)

[ ] Attorney for Petitioner (Plaintiff)/Respondent (Defendant) [ ] Petitioner (Plaintiff)

[ ] Respondent (Defendant) was/were duly served but failed to appear

Based upon the representation/record made, IT IS HEREBY ORDERED that the above motion is [ ] granted [ ] denied [ ] granted in part/denied in part as follows: Defendant may have unsupervised immediate telephone contact with the parties' minor children. Defendant, in order to exercise his telephone contact shall telephone Plaintiff's cell phone and ask to speak to the children. Defendant may also

I do hereby certify that this is a [illegible], true and correct copy of the original on file in this office

/s/ [Illegible]
Clerk, Family Court,
First Circuit State of Hawaii

In addition, permit members of his family to communicate with the minor children during his telephone contact. Defendant may telephone the children daily up to their bed times. The order for protection shall expire in 50 years or until either party modifies the same.

Dated: Honolulu, Hawaii MAR 17 2005

/s/ R. Mark Browning [SEAL]
JUDGE OF THE ABOVE
ENTITLED COURT